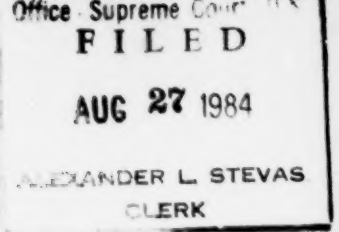


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No. 83-1920



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**IN THE SUPREME COURT  
OF THE UNITED STATES**

(October term, 1983)

**RICHARD L. WINDSOR,**  
Petitioner,

v.

**THE TENNESSEAN, et al.,**  
Respondents.

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**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**PETITIONER'S REPLY TO  
RESPONDENTS' BRIEF IN OPPOSITION**

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## PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents' brief in opposition does not address the question raised in the Petition. It neither mentions this Court's decision in *Montana v. United States* nor suggests how the federal circuit court's summary sua sponte collateral estoppel despite there having been no proponent, no proceeding addressing the question of such an estoppel and no examination of the state court record can be reconciled with *Montana's* express requirements of due process.

Respondents' brief (p.2) states that the federal circuit court affirmed their dismissal, ". . . in part on grounds of collateral estoppel." A reading of the opinion (App. 11) shows the estoppel to be the *only* ground.

The first sentence of Respondents' brief in opposition argues, evoking an irony under these facts, that the Petition contains statements of fact that do not *appear* to be part of the record. *What* record does this unexplained contention contemplate?

Is it the record in the federal district court in which Mr. Windsor's affidavit (para. 94) explains that defendant Hardin admitted that he had met privately with the newspaper's reporter and fully explained to her that Windsor had not attempted to block an order of the chief district judge by issuing a subpoena? (No defendant made any affidavit in *any* record.)

Is it the record in the federal proceedings (not considered in the state proceeding) wherein the Deputy Attorney General of the United States explains via affidavit that defendant Hardin came to him at a social reception 10 days after his private meeting with the reporter and advised him of Mr. Windsor's

"apparent" attempt to circumvent a Court Order in a criminal case . . . and that Hardin "had with him a newspaper article or articles which he used to illustrate to me the problems that Mr. Windsor was *apparently* causing"...?

Is it the record of the 1980 federal proceedings in Nashville showing (and not countenanced in any way by the state appellate opinion) that there was *never* any such "Court Order" outside of the newspaper's fabrication?' (Petition, pp. 11-12, n. 11).

Is it the record before the circuit court in Coffee County, Tennessee, or the record in the Supreme Court of Tennessee (not examined by the federal appellate court before fashioning the sua sponte estoppel from the intermediate state appellate opinion) which reveals the former U.S. Attorney (Hardin) defendant's own words to Mr. Windsor on the day of the newspaper first revealed his private out-of-court acknowledgements:

HARDIN: "(Hardin said he was enraged when he found out Windsor)...

'attempted to block the Chief Judge's order by issuing a subpoena'. I said I was enraged at something like that. And then *I* sat down . . . *I* sat down and, you know, determined that *these* were the facts, and I was no longer in a rage.

So what she *did*, is she, she, took half of that statement.

You know, I was telling her that to try to explain to her so she wouldn't . . . you know, that she'd get a better understanding of what was goin' on. And, uh, she took *half* my statement.

... So, I mean, I just wanted you to understand that ... that she took *half* of what I said, and not put the other half in there."

Or does Respondents' contention refer to the record (encapsulated for three years by the erroneous dismissal on an absolute immunity rationale and therefore never resolved *or* available in the state side of the proceedings) in the federal district court wherein the former U.S. Attorney (Hardin) defendant submitted a false answer to Mr. Windsor's request for admission, *before* he was aware that his earlier admission had been preserved:

(M.D. 15) "(Admit) that on or about July 11, 1980, you met privately with *Tennessean* reporter, Defendant Carole Clurman and explained to her that you had determined the true facts concerning Assistant U.S. Attorney Richard Windsor's efforts undertaken in order to bring certain evidence before the Grand Jury

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1. (cf. p. 64, 1.22 - p. 65, 1.10 of the same transcript relied on in the state proceedings by the newspaper defendants):

MR. WINDSOR: "Mr. Farmer, you haven't asked me, but there was, also many more things in this. The most important of which was the rough draft of the letter obviously intended for Eddie Sisk's signature soliciting some probation official in the state of Florida to make modifications in Mr. Lovell's probation. You haven't asked me about that. But in my humble opinion and judgment of what I owe to the position of Assistant United States Attorney were I to allow this in any way -- *except Judge Morton, if he had ordered me to give it back*, I certainly would have. But for me to allow these things in any way to slip off into the hands of these people with a motive to destroy them, I would be remiss in my duty. I wasn't about to do that, *unless the judge ordered me to, and he never has.*"

and that Windsor had not attempted to block the Chief Judge's Court Order and that you were not "enraged" as she later reported."

**RESPONSE** "Hal Hardin objects to this Request for the reason that it fails to separately set forth each matter to be admitted. Without waiving the foregoing, Hal Hardin **DENIES** the matters set forth in this Request. He would further aver that to the best of his recollection . . . his comments to defendant Clurman were to issue his normal "no comment" statement and on one occasion early in July of 1980, to explain to her what the plaintiff Windsor advised him were the true facts . . ."

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Respondents' brief in opposition then proceeds to admit (pp. 2-3) that indeed the state court of appeals did not rule all the publications and statements alleged to have been libelous. They then ask this Court to "assume" with them and the Sixth Circuit that via general conclusion the state appellate court also found this publication (upon which its opinion is silent and upon which Respondents adduced *no* evidence<sup>2</sup>) to be non-actionable. Not even hornbook law admits the possibility of such an "assumption" to support a judgment. 49 C.J.S. JUDGMENTS, Section 44.

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2. cf. Respondents' statement to this Court in their reply brief in No. 83-5611:

(p.1), "Since they asserted that their motions could be decided by comparing the news articles with the transcript of the hearings, the Respondents also filed motions for protective orders with respect to discovery;" (p.3), "the only factual issue . . . was whether the articles were substantially accurate accounts of the . . . hearings."

## COUNTER-ARGUMENT

In this unfair instance the sua sponte federal appellate formulation of an estoppel without resort to the record of the state proceeding is the *sole* fragile stalk of support for two weighty conclusions. The first is the complete extinguishment of Petitioner's cause of action in an otherwise actionable claim. The second is a summary formulation, at the appellate level prior to remand for any proof, of a qualified immunity defense for the (former) federal official defendant. This conclusory defense apparently could not have survived a showing of deliberate actual malice. It may well be in conflict with this Court's decision in *Harlow v. Fitzgerald*, although that question is not the one<sup>3</sup> upon which the Petition comes to this Court.

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3. For nearly a hundred years this Court's decisions in *Russell v. Place*, 94 U.S. 606, 608 (1876) and *DeSollar v. Hansome*, 158 U.S. 216, 221 (1894) have rejected the "assumption" urged in Respondents' brief in opposition, and have instead taught:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and *determined*."

In *Williams v. Bennett*, 689 F2d 1370, 1385-1386 (5 Cir. 1982) the Fifth Circuit examined summarily dismissed claims alleging deliberate injury in a setting which presented the question of both a *Harlow* type good faith immunity and collateral estoppel preclusion. It held that because of the required proof of deliberate injury under the allegations, the subjective good faith and intent of an individual defendant remains relevant even in light of the objectivity now associated (*Harlow*) with the good faith defense.

In *Concordia v. Bendekovic*, 693 F2d 1073 (11 Cir. 1982) a federal appellate court rejected Respondents' instant reasoning that their urged "assumption" (apparently indulged by the Sixth Circuit) makes Petitioner's question devoid of merit:

"The record consists of the defendant's allegation that the issue . . . was litigated in the state proceeding . . . and a copy of the judgment in the state proceeding . . . While this evidence suggests that the underlying issue of the present case was litigated in the state court, it does not satisfy all of the requisites necessary to invoke the doctrine of res judicata. For example, the evidence does not indicate that the issue was actually litigated or that there has been a *final judgment* in the state proceeding. (footnote omitted)".

“Additional evidence, preferably a copy of the state trial court’s records, is required in order to apply the doctrine of res judicata in the context of either a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment.

. . . In the case at bar, the record of the state court proceedings was not introduced. No certified or exemplified copies of the pleading record or judgmental material were ever presented. The district judge accepted the copies of . . . the state judgment as correct representations of what the state trial court’s record contained. *This evidence does not satisfy the minimum requirement* that the defense of res judicata appear from the face of the complaint. ...We, therefore, remand to the district court.”

## CONCLUSION

In *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), this Court has eloquently articulated the legal principle which answers the Petition's narrow question of due process:

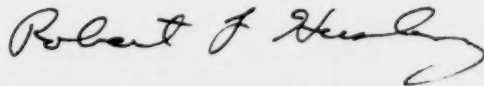
"But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues . . . it . . . cannot stand."

A summary disposition on the merits allowed by Supreme Court Rule 23.1 directing only an inquiry to assure that the estoppel can be reconciled with *Montana v. United States* would restore the fairness now lacking under these facts, of grave concern to the public as they stand against a background suggesting deliberate reprisal and injury to an inferior officer of the federal government for adhering to the precept of the Code of Ethics for Government Service - "Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government

department" - "Uphold these principles, ever conscious that public office is a public trust."

Respectfully submitted,  
ROBERT L. HUSKEY

A handwritten signature in cursive script, appearing to read "Robert L. Huskey". The signature is fluid and extends to the right with a long, sweeping tail.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of August, 1984, I served the foregoing Appendix by causing copies to be mailed, first class, postage prepaid, to:

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